March 23, 2009

FACT SHEET

Proposed Modification of National Pollutant Discharge Elimination System (NPDES) General Permit No. CAG280000 for Offshore Oil and Gas Exploration, Development and Production Operations off Southern California.

SUMMARY: EPA Region 9 is proposing certain modifications of its general NPDES permit (permit No. CAG280000) for discharges from offshore oil and gas exploration, development and production facilities located in Federal waters off the coast of Southern California. The permit, issued on September 22, 2004 (69 FR 56761), required a one-year monitoring study for discharges of produced water, cooling water and fire control system test water to evaluate whether these discharges would have reasonable potential to cause or contribute to exceedances of marine water quality criteria. For produced water, the permit required monitoring for 26 pollutants which may be present in the discharges. For cooling water and fire control system test water, monitoring was required for total residual chlorine which may be used for anti-fouling.

The monitoring study has now been completed and, consistent with 40 C.F.R. 122.62(a)(2) and the Region's stated intentions at the time of permit issuance, Region 9 is proposing to modify the permit to include additional effluent limitations and monitoring requirements for those certain pollutants in discharges for which the monitoring study showed a reasonable potential to cause or contribute to exceedances of marine water quality criteria.

For produced water discharges, Region 9 is also proposing to use a different water quality criterion for undissociated sulfide from the one in the existing permit based on the results of a new study contained in the administrative record concerning the toxicity of undissociated sulfide to marine organisms. The proposed effluent limitations for undissociated sulfide, applicable to produced water discharges in the modified general permit, would be based on consideration of one of the factors listed in EPA's ocean discharge criteria, specifically, factors relating to the effect of the discharge, 40 C.F.R. 125.122(a)(9). The basis for the undissociated sulfide limitations would differ from the basis the Region had identified earlier, specifically, marine water quality criteria developed under Clean Water Act section 304(a)(1), which EPA had considered under 40 C.F.R. 125.122(a)(10).

DATES: Comments on the proposed permit modifications must be received or postmarked no later than May 4, 2009.

ADDRESSES: Public comments on the proposed permit modifications may be submitted by U. S. Mail to: Environmental Protection Agency, Region 9, Attn: Lisa Honor, NPDES Permits Office (WTR-5), San Francisco, CA 94105 -3901, or by email to honor.lisa@epa.gov.

FOR FURTHER INFORMATION CONTACT: Eugene Bromley, EPA, Region 9, CWA Standards and Permits Office (WTR-5), 75 Hawthorne Street, San Francisco, California 94105-3901, or telephone (415) 972-3510. Copies of the proposed permit modification and fact sheet will be provided upon request and are also available on Region 9's website at http://www.epa.gov/region09/water/. Additional information concerning the general permit overall is available in the fact sheet accompanying the final issuance of the general permit on September 22, 2004. The 2004 general permit and fact sheet are available on Region 9's website at http://www.epa.gov/region09/water. The new study concerning the revised water quality criterion for undissociated sulfide is also available on Region 9's website.

ADMINISTRATIVE RECORD: The proposed permit modification, fact sheet and other related documents in the administrative record are on file and may be inspected any time between 8:30 a.m. and 4:00 p.m., Monday through Friday, excluding legal holidays, at the following address:

U.S. EPA, Region 9
CWA Standards and Permits Office (WTR-5)
75 Hawthorne Street
San Francisco, CA 94105-3901.

SUPPLEMENTARY INFORMATION:

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A. Reasonable Potential Monitoring Study. Among other factors, the Ocean Discharge Criteria regulations (40 CFR Part 125 Subpart M) require a consideration of marine water quality criteria for discharges to the ocean permitted under the NPDES permit program. In considering these criteria, particularly in determining permit conditions that would be needed to support a determination that the resulting discharges will not cause unreasonable degradation of the marine environment, the permit included a study requirement using the statistical procedures that EPA uses in determining the need for water quality-based effluent limits for point source discharges to waters of the United States, including the territorial seas. The study, captioned "reasonable potential monitoring study" was required in order to determine whether the ocean discharges regulated under the permit would cause, or have the reasonable potential to cause, or contribute to non-attainment of marine water quality criteria at the boundary of the mixing zone, which is the location identified in the Ocean Discharge Criteria regulations at 40 C.F.R. 125.123(d)(1).

General permit No. CAG28000 included the study requirement because at the time of the issuance insufficient data were available to evaluate the reasonable potential for discharges of produced water, cooling water and fire control system test water to cause or contribute to exceedances of the marine water quality criteria for pollutants that Region 9 had identified as potentially present in the discharges. The permit's study requirements were derived from the statistical procedures explained in EPA's Technical Support Document for Water Quality-Based Toxics Control (TSD) (EPA/505/2-90-001). EPA explained in the permit that if a discharge demonstrated the reasonable potential to cause non-attainment of a marine water quality criterion at the boundary of a mixing zone, then the permit could be reopened and modified to include additional effluent limitations and monitoring requirements to ensure compliance with the water quality criteria. Today Region 9 is proposing to reopen and modify the general permit to include such additional limitations and requirements, thus enabling its determination that the authorized discharges will not cause unreasonable degradation of the marine environment.

For produced water, the permit required monitoring monthly during the first year of the permit for 26 pollutants of concern that Region 9 had identified as potentially present in the discharges. For cooling water and fire control system test water, monitoring was also required monthly during the first year for total residual chlorine which is used at some platforms as an anti-fouling agent. Monitoring results were due by March 1, 2006 and were submitted for all platforms in a timely manner. The permit also required the submittal of an analysis by March 1, 2006, using statistical procedures in the TSD, of the reasonable potential of the discharges to cause or contribute to non-attainment of the previously specified marine water quality criteria. These analyses also were submitted for all platforms in a timely manner.

The general permit authorizes discharges from 22 offshore platforms. However, only 15 of the platforms discharge produced water. Thirteen of the platforms showed reasonable potential to exceed applicable marine water quality criteria for one or more of the 26 pollutants monitored in produced water; the applicable water quality criteria used were the more stringent of CWA section 304(a) criteria or the California Ocean Plan objectives as required by the 2004 final general permit. One of the platforms (Platform Irene) rarely discharges produced water and the operator had not collected the minimum number of samples (which is ten samples) recommended by the TSD to do a reasonable potential analysis. Moreover, the discharges

measured for this platform were from small scale pilot tests of potential produced water treatment systems which may not be representative of future discharges resulting from the treatment system ultimately installed. Thus, Region 9 is deferring action on this platform until the general permit is reissued in 2009. Until then, for the majority of the pollutants addressed by the reasonable potential study, Platform Irene would continue to be subject to effluent limits in its previous individual permit, and the platform would continue to conduct monitoring for all 26 of the pollutants as required by Part II.B.1.b.2 of the general permit.

Seven of the 22 platforms use chlorine in cooling water or fire control system test water. Six of the seven platforms showed a reasonable potential to cause non-attainment of the marine water quality criteria for chlorine.

Proposed effluent limitations and monitoring requirements to control the pollutants in the above discharges and ensure compliance with marine water quality criteria are discussed in section C below.

B. Modified Criterion for Undissociated Sulfide. The general permit provides that a permittee may request that Region 9 modify the criterion used for a pollutant of concern in produced water discharges based on additional studies of the toxicity of the pollutant. In April 2006, several permittees operating under the general permit requested a modification of the criterion used in the permit for undissociated sulfide, which the permit had identified as 2 ug/l. The permittees requested a modified criterion of 12 ug/l based on a new study[1] submitted by the permittees of the toxicity of this material to marine organisms.

Upon review of the new study, EPA's Office of Science and Technology recommended that Region 9 compare the proposed criterion (12 ug/l) with the criterion that would be obtained using EPA's 1985 procedure for deriving water quality criteria[2] and then using the more protective of the two in the permit. Using the toxicity test data in the new study and the 1985 procedure, Region 9 derived a modified criterion value of 5.79 ug/l.

The new study also demonstrates that the acute to chronic ratio for undissociated sulfide in these waters would be approximately 1.0, given that the material is a fast-acting toxicant. Region 9 reasonably believes this ratio is based on a valid demonstration, and thus proposes today that the chronic criterion would also be 5.79 ug/l. The general permit utilizes chronic criteria for deriving effluent limitations for pollutants of concern in produced water discharges; as such, the modified criterion proposed for undissociated sulfide for use in the proposed modified general permit is the newly derived chronic criterion of 5.79 ug/l. The reasonable potential analysis submitted by the permittees had used a water quality criterion of 2 ug/l for undissociated sulfide. Region 9 revised the analysis using 5.79 ug/l instead of 2 ug/l; for platforms where reasonable potential was demonstrated even with the revised water quality

[1] Weston Solutions, Inc. and Marine Research Specialists, Site-Specific Sulfide Criterion for Produced-Water Discharges at Five California OCS Platforms, Technical Report 427-272, April 25, 2006.

[2] Guidelines for Deriving Numerical National Water Quality Criteria for the Protection of Aquatic Organisms and their Uses (1985 Guidelines), U.S. EPA, available at: http://www.epa.gov/waterscience/criteria/aqlife/index.html

criterion, effluent limitations and monitoring requirements are being proposed as discussed below in section C.

Based on a permittee request, the general permit would also be modified to allow the dissolved sulfide or total sulfide concentration to be used to calculate the undissociated sulfide concentration. Currently, Part II.B.1 of the general permit requires that the undissociated sulfide concentration be based on the measured concentration of total sulfide, which in the absence of acid soluble metallic sulfides will be nearly equivalent to dissolved sulfide. However, for produced water discharges, the use of the total sulfide concentration could overestimate the concentration of undissociated sulfide. Although the laboratory procedure for measuring the dissolved sulfide concentration is somewhat more complicated, the general permit is proposed to be modified to provide permittees this option at their discretion to avoid possibly overestimating the undissociated sulfide concentration.

One of the existing general permittees has requested a delay in the effective date (of at least one year) for any new effluent limits for undissociated sulfide since the permittee believes that additional treatment or dilution may be necessary to comply with the limits. The Ocean Discharge Criteria regulations at 40 CFR 125.123(d)(3) provide that a variety of special conditions, including a schedule of compliance for existing discharges, may be included in a permit when appropriate. Although the proposed permit modification does not include any compliance schedules, Region 9 would consider requests for compliance schedules (on a platform-by-platform basis) for the final permit modification. Such requests would need to include sufficient information for Region 9 to justify a compliance schedule in light of the regulations at 40 CFR 122.47, including the need for the compliance schedule and information showing that the schedule would ensure compliance at the earliest possible date.

A permittee also requested that the modified permit include a provision to account for the decay of undissociated sulfide in the mixing zone. The permittee is considering conducting a study of the decay in the ocean and requested that compliance determinations at the edge of the mixing zone include decay if it can be established by the study. In response, the proposed modified permit provides that a permittee may submit the results of such a study and request that the permit be modified to account for the decay. Upon receipt of the study, Region 9 would consider a formal modification of the permit to include a decay factor based on the study results.

For the issuance of the general permit in 2004, Region 9 concluded that the proposed discharges would not cause unreasonable degradation of the marine environment as defined in the Ocean Discharge Criteria regulations at 40 CFR 125.121(e). Given that the discharges would continue to be subject to protective water quality criteria, Region 9 believes that proposed modified permit limits for undissociated sulfide would ensure that the discharges would not cause unreasonable degradation.

C. Proposed Effluent Limitations and Monitoring Requirements. Using the procedures in the TSD, Region 9 calculated effluent limitations for the pollutants in discharges of produced water, cooling water and fire control system test water for which reasonable potential was demonstrated based on the monitoring study. For each pollutant for which the study

demonstrated reasonable potential, the proposed modification includes effluent limitations for such pollutant on a platform-by-platform basis. For produced water, these effluent limitations are found in a new Appendix C, which Region 9 proposes to add to the general permit. For cooling water and fire control system test water, the effluent limitations are found in a new Appendix D which would also be added to the permit. These effluent limits would be post-dilution limits in that they would be applicable following initial dilution in the mixing zone defined in Part V of the general permit. The use of post-dilution limits (as opposed to end-of-pipe limits) would provide flexibility in that a permittee could implement additional measures to increase dilution such as multiple-port diffusers, if necessary, to comply with the limits. NPDES regulations at 40 CFR 125.3(f) provide that "non-treatment" techniques such as increased dilution may be used to comply with water quality-based effluent limits (such as those found in Appendix C) provided certain criteria are met including a demonstration that such techniques are the preferred environmental and economic method for achieving compliance. EPA believes that the post-dilution limits would be protective of the marine environment in that compliance with applicable water quality criteria would be required at the edge of the mixing zone, consistent with the Ocean Discharge Criteria regulations. Further, for undissociated sulfide which is the pollutant which poses the most significant potential compliance problems for the permittees, feasibility studies indicate that effluent treatment would be a less promising method than additional dilution for achieving compliance. Post-dilution limits will also ensure that if dilution were to decrease in the future (due for example to an increase in the discharge volume), the effluent limits at the edge of the mixing zone would also automatically decrease. However, if end-of-pipe limits were used, a permit modification would be required before the more stringent effluent limits would take effect.

For two platforms (platforms Gina and Gilda), the permittee pointed out that new treatment procedures were implemented in 2005 to better control sulfide in produced water discharges. As a result, data collected prior to the changes are not necessarily representative of current or future conditions on the platforms. As such, the permittee requested that the reasonable potential analysis be based on 12 samples (which is the same number as required by the reasonable potential study) collected subsequent to the changes. Region 9 believes this is a reasonable request and the reasonable potential analysis for these platforms was conducted as suggested. Similarly for Platform Hidalgo, the permittee pointed out that the data collected during the reasonable potential period of the general permit are not representative of current or future conditions on this platform. As a result, the reasonable potential analysis for this platform was based on more recent samples which are representative of current and future conditions on the platform.

Monitoring once per quarter would also be required for the pollutants proposed to be regulated in each of the discharges. The monitoring results would be reported in the quarterly discharge monitoring reports. For pollutants with no reasonable potential in produced water, monitoring once during the remainder of the permit term would be required as set forth in Part II.B.1.e.3 of the general permit.

Lastly, certain additional modifications of the permit are proposed to account for the fact that the reasonable potential monitoring period of the 2004 permit has passed. Part II.B.1.f.1 of

the 2004 permit would be deleted and a new requirement added to Part II.B.6.a which would require compliance with the new Appendix C for produced water. Similar revisions are proposed for Table 12 and Part II.F.4 of the 2004 permit with regards to requirements for chlorine in discharges of cooling water and fire control system test water.

D. Requirements Related to the Coastal Zone Management Act. The Coastal Zone Management Act (CZMA) requires that Federal activities and projects affecting the coastal zone of a state, including Federally-permitted activities, must be consistent with the enforceable policies of an approved state Coastal Management Plan (CMP). CZMA sections 307(c)(1) and (c)(3), 16 U.S.C. §§ 1456(c)(1) and (c)(3)).[3] California has a CMP which was approved in 1978; the CZMA authority is the California Coastal Commission (CCC).

Since the date Region 9 issued general permit No. CAG280000, the CZMA regulations specifying Federal agencies' obligations under CZMA sections (c)(1) and (c)(3) have been revised. In accordance with revised regulations implementing the CZMA (71 FR 788, January 5, 2006), the issuance of a general NPDES permit by EPA that does not involve case-by-case or individual issuance of a license or permit is considered a "Federal agency activity" subject to the consistency determination requirements of CZMA section 307(c)(1). See new 15 C.F.R. 930.31(d). If the relevant state agency's conditions are not incorporated into the general permit or the state agency objects to the general permit, then the general permit is not available for use in that state unless the applicant or person who wants to use the general permit provides the state agency with a consistency determination and the state agency concurs. Essentially, if EPA does not include a state agency's conditions or if the state agency objects, then the applicable CZMA consistency determination requirements shift from those in CZMA section 307(c)(1) into those in CZMA section 307(c)(3).

As a threshold matter, CZMA consistency determination requirements apply not only to federal activities and federal licenses or permits for activities that occur within the coastal zone, but also to federal activities and federal licenses or permits for activities outside the coastal zone that affect any land or water use or natural resource of the coastal zone. Region 9 believes that the proposed permit modification could affect coastal uses or resources of the coastal zone of State of California. Region 9 also believes that the proposed permit modification would be consistent with the CMP.

3 EPA is also required to comply with the CZMA pursuant to 40 CFR 122.49(d).

On December 10, 2003, Region 9 provided a consistency certification to the CCC for a proposed version of general permit No. CAG280000, in which the permit would apply California Ocean Plan (COP) objectives at the boundary of State waters, specifically, the boundary of the territorial seas that extends three miles from shore. The manner by which this proposed general permit would have applied the COP objectives would have been to rely on the more stringent of either the CWA section 304(a) marine water quality criteria at the boundary of the mixing zone or COP objectives at the boundary of State waters in determining the need for and then establishing effluent limitations. At the time of this proposal, Region 9 had determined that this approach to evaluating the need for (i.e., via the reasonable potential study) and subsequently establishing any necessary effluent limitations was consistent with the enforceable policies of the approved CMP administered by CCC. On March 18, 2004, the CCC unanimously objected to Region 9's consistency determination and found that the proposed general permit was not consistent to the maximum extent practicable with the State's CMP, primarily because the proposed permit provided for compliance with the COP objectives at the boundary of State waters rather than at the boundary of the mixing zone.

The CCC's objection to the proposed general permit precluded Region 9 from authorizing discharges under the general permit as proposed. As such, in issuance of the final general permit, Region 9 modified how it would apply COP objectives in determining the need for and deriving permit limits. Specifically, the final permit required that, in the conduct of the reasonable potential study, general permittees were required to evaluate the potential for non-attainment of the CWA section 304(a) marine water quality criteria or the COP objectives and to apply the more stringent of the two at the boundary of the mixing zone, rather than applying the COP objectives at the boundary of State waters. This was based on a 2001 consistency concurrence from the CCC for the permit. After a legal challenge to the final general permit, specifically, to the general permit's requirement to consider attainment of the COP objectives at the boundary of the mixing zone (i.e., outside of State waters rather than at the boundary of State waters) based on Region 9's CZMA compliance actions, was dismissed as unripe, implementation of the reasonable potential study requirements proceeded.

As explained above, Region 9 proposes modification of the general permit to incorporate the results of the reasonable potential study requirements, including proposed effluent limitations for specified pollutants on a platform-by-platform basis according to the results of the reasonable potential evaluations that used the more stringent of EPA's 304(a) criteria or COP objectives at the boundary of the mixing zone. A majority of the proposed limitations in the permit are based on study results that demonstrate that, for a particular pollutant, a platform's discharge is likely to cause or have reasonable potential to cause or contribute to non-attainment of a CWA section 304(a) water quality criterion at the boundary of the mixing zone. There are some instances, however, where the potential for non-attainment of a COP objective at the boundary of the mixing zone, rather than the CWA section 304(a) water quality criterion, determined the need for the limitation. Those instances are identified in the reasonable potential evaluation spreadsheets that are included in the administrative record for today's proposed modification.

Region 9 believes that the proposed modification is fully consistent to the maximum extent practicable with the enforceable policies of the State's approved CMP. On _____,

Region 9 submitted a consistency certification to the CCC for the proposed permit modification. Region 9 maintains, however, that if the determination of the need for limitations (as well as the limitations themselves) assures attainment of the COP objectives applied at the boundary of State waters, rather than at the boundary of the mixing zone, the modified permit would still be consistent with the enforceable policies of the approved State CMP. As such, Region 9 would carefully consider data and analysis submitted by general permittees and the public demonstrating (or refuting) the need for limits to assure compliance with COP objectives at the boundary of the mixing zone prior to taking final action on the general permit modification proposed today. Commenters interested in this issue should review of the reasonable potential evaluation spreadsheets in the administrative record in order to determine which limits would change (and for which general permittees) in any final general permit modification that applied COP objectives at the boundary of State waters rather than the boundary of the mixing zone, as EPA proposes today. As a practical matter, however, if the CCC were to object to any final general permit modification that did not incorporate the State's conditions, individual general permittees afforded fewer or less stringent limits (based on evaluation of attainment of the COP objectives at the boundary of State waters rather than at the boundary of the mixing zone) would be required to present a consistency determination to the CCC for its review and concurrence.

E. Requirements Related to the Endangered Species Act. The Endangered Species Act (ESA) allocates authority to and administers requirements upon Federal agencies regarding threatened or endangered species of fish, wildlife, or plants and habitat of such species that have been designated as critical. Its implementing regulations (50 CFR Part 402) require Region 9 to ensure, in consultation with the Secretary of the Interior or Commerce, that any action authorized, funded or carried out by Region 9 (including permit issuance) is not likely to jeopardize the continued existence of any threatened or endangered species or adversely affect its critical habitat (40 CFR 122.49(c)). Implementing regulations for the ESA establish a process by which Federal agencies consult with one another to ensure that the concerns of both the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) are addressed.

For the original issuance of the general permit in 2004, Region 9 concluded that the permitting action would have no effect on listed species. This conclusion was based on two separate biological assessments which were prepared to assess the potential impacts of the permit issuance on listed species under the jurisdiction of the USFWS and the NMFS. Since the proposed permit modification would simply establish permit limits based on procedures which were included in the 2004 permit, Region 9 believes that the proposed modification would also not affect listed species. Region 9 is providing copies of the proposed permit modification and fact sheet to the Long Beach office of the NMFS and the Ventura Field Office of the USFWS for review and comment on Region 9's conclusions concerning the effects of the discharges which would be authorized by the proposed permit modification on listed species.

F. Permit Modification Effective Date. In accordance with 15 CFR 930.31(d), if the CCC concurs with the permit modification, the modification would become effective for all platforms without additional review of individual platform discharges by the CCC. However, if the CCC objects to the permit modification, the modification would not become effective for a given

platform until an individual consistency certification had been submitted by the permittee and concurred upon by the CCC. It is also possible that the CCC may object to a consistency certification submitted by an operator for an individual platform. In such a circumstance, the operator may appeal to the Secretary of Commerce as provided by 15 CFR Part 930, Subpart H. The Secretary may override or uphold a CCC objection. To account for the various scenarios and outcomes stemming from the CCC review, and to provide time for permittees to comply with the new requirements, the effective date of the permit modification is proposed as follows:

(1) if, on the date of the Federal Register notice of the final permit modification, the California Coastal Commission (CCC) has concurred that the permit modification is consistent with the California CMP, the permit modification would become effective on the first day of the platform's quarterly discharge monitoring report (DMR) period that begins at least 45 days after the Federal Register notice; or

(2) if, on the date of the Federal Register notice of the final permit modification, the CCC has yet to act on the final permit modification, but ultimately concurs, the permit modification would become effective on the first day of the platform's quarterly DMR period that begins at least 45 days after the date of the CCC concurrence; or

(3) if, on the date of the Federal Register notice of the final permit modification, the CCC has objected to the final permit modification, permittees for the platforms listed in Appendices C and D of the modified general permit would be required to submit individual consistency certifications to the CCC for the permit modification. These certifications would have to be submitted to the CCC within three months of the date of the Federal Register notice of final permit modification; or

(4) if, on the date of the Federal Register notice of the final permit modification, the CCC has yet to act on the final permit modification, but ultimately objects, permittees for the platforms listed in Appendices C and D of the modified general permit would be required to submit individual consistency certifications to the CCC for the permit modification. These certifications would have to be submitted to the CCC within three months of the date of the CCC's objection.

(5) for all platforms for which an individual consistency certification is submitted to the CCC, and the CCC concurs with the certification, the permit modification would become effective on the first day of the platform's quarterly DMR period that begins at least 45 days after the date of the CCC concurrence; and

(6) for all platforms for which an individual consistency certification is submitted to the CCC, and the CCC objects to the certification, the permittee would be required to submit an appeal to the Secretary of Commerce within 30 days of the date of the CCC's objection in accordance with 15 CFR 930.125. For all platforms for which a timely appeal is filed with the Secretary of Commerce, and the Secretary overrides the CCC's objection, the permit modification would become effective on the first day of the platform's quarterly DMR period that begins at least 45 days after the date of the Secretary's decision. If the Secretary upholds a CCC objection which has been appealed by the permittee for a platform, this permit modification would not become effective for that platform.

As described above, if the CCC objects to the permit modification, permittees would be required to submit individual consistency certifications within three months (of either the date of the objection or the Federal Register notice of the final permit modification, whichever is later) for all platforms affected by the permit modification. EPA believes that three months is a sufficient amount of time for permittees to prepare and submit their certifications. Permittees would also be required to file an appeal with the Secretary of Commerce within 30 days of an objection to an individual consistency certification. These deadlines will ensure that permittees actively pursue coverage under the modified general permit, rather than continuing to discharge indefinitely under the existing general permit.

If the Secretary of Commerce overrides a CCC objection in accordance with 15 CFR 930.130(e)(1), the general permit modification would go into effect in accordance with scenario (6) above. If the Secretary upholds a CCC objection which has been appealed by the permittee for a platform, this permit modification would not become effective for that platform, as 15 CFR 930.130(e)(2) provides that EPA "shall not approve the activity." This means that the general permit modification could not become effective for the platform, and the operator would have to apply for an individual permit and seek CCC consistency determination.

EPA cannot predict how much time may be necessary to ultimately resolve the consistency issue under the various scenarios discussed above. Accordingly, the existing general permit would remain in effect while the issue was being addressed.

It should also be noted that the existing general permit has staggered quarterly DMR reporting periods for different platforms. To avoid the new requirements becoming effective within a given quarter, the effective date is proposed to begin at the start of a platform's regular quarterly DMR period as specified above.

G. Permit Modification Appeal Procedures. Within 120 days following notice of EPA's final decision for the general permit modification under 40 CFR 124.15, any interested person may appeal the permit decision in the Federal Court of Appeals in accordance with section 509(b)(1) of the Clean Water Act (CWA). Persons affected by a general permit may not challenge the conditions of a general permit as a right in further Agency proceedings. They may instead either challenge the general permit in court, or

apply for an individual permit as specified at 40 CFR 122.21 (and authorized at 40 CFR 122.28), and then petition the Environmental Appeals Board to review any condition of the individual permit (40 CFR 124.19 as modified on May 15, 2000, 65 FR 30911).

H. Compliance with the Regulatory Flexibility Act for General Permits. The Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

The legal question of whether a general permit (including a general permit modification), as opposed to an individual permit qualifies as a "rule" or as an "adjudication" under the Administrative Procedure Act (APA) has been the subject of periodic litigation. In a recent case, the court held that the CWA Section 404 Nationwide general permit before the court did qualify as a "rule" and therefore that the issuance of the general permit needed to comply with the applicable legal requirements for the issuance of a "rule." *National Ass'n of Home Builders v. US Army Corps of Engineers,* 417 F.3d 1272, 1284-85 (DC Cir.2005) (Army Corps general permits under Section 404 of the Clean Water Act are rules under the APA and the Regulatory Flexibility Act; "Each NWP [nationwide permit] easily fits within the APA's definition of a 'rule.'… As such, each NWP constitutes a rule . . .").

As EPA stated in 1998, "the Agency recognizes that the question of the applicability of the APA, and thus the RFA, to the issuance of a general permit is a difficult one, given the fact that a large number of dischargers may choose to use the general permit." 63 FR 36489, 36497 (July 6, 1998). At that time, EPA "reviewed its previous NPDES general permitting actions and related statements in the Federal Register or elsewhere," and stated that "[t]his review suggests that the Agency has generally treated NPDES general permits effectively as rules, though at times it has given contrary indications as to whether these actions are rules or permits." *Id.* at 36496. Based on EPA's further legal analysis of the issue, the Agency "concluded, as set forth in the proposal, that NPDES general permits are permits [i.e., adjudications] under the APA and thus not subject to APA rulemaking requirements or the RFA." *Id.* Accordingly, the Agency stated that "the APA's rulemaking requirements are inapplicable to issuance of such permits," and thus "NPDES permitting is not subject to the requirement to publish a general notice of proposed rulemaking under the APA or any other law . . . [and] it is not subject to the RFA." *Id.* at 36497.

However, the Agency went on to explain that, even though EPA had concluded that it was not legally required to do so, the Agency would voluntarily perform the RFA's small-entity impact analysis. *Id.* EPA explained the strong public interest in the Agency following the RFA's requirements on a voluntary basis: "[The notice and comment] process also provides an opportunity for EPA to consider the potential impact of general permit terms on small entities and how to craft the permit to avoid any undue burden on

small entities." *Id.* Accordingly, with respect to the NPDES permit that EPA was addressing in that Federal Register notice, EPA stated that "the Agency has considered and addressed the potential impact of the general permit on small entities in a manner that would meet the requirements of the RFA if it applied." *Id.*

Subsequent to EPA's conclusion in 1998 that general permits are adjudications, rather than rules, as noted above, the DC Circuit recently held that Nationwide general permits under section 404 are "rules" rather than "adjudications." Thus, this legal question remains "a difficult one" (*supra).* However, EPA continues to believe that there is a strong public policy interest in EPA applying the RFA's framework and requirements to the Agency's evaluation and consideration of the nature and extent of any economic impacts that a CWA general permit could have on small entities (e.g., small businesses). In this regard, EPA believes that the Agency's evaluation of the potential economic impact that a general permit would have on small entities, consistent with the RFA framework discussed below, is relevant to, and an essential component of, the Agency's assessment of whether a CWA general permit would place requirements on dischargers that are appropriate and reasonable. Furthermore, EPA believes that the RFA's framework and requirements provide the Agency with the best approach for the Agency's evaluation of the economic impact of general permits on small entities. While using the RFA framework to inform its assessment of whether permit requirements are appropriate and reasonable, EPA will also continue to ensure that all permits satisfy the requirements of the Clean Water Act.

Accordingly, EPA has committed that the Agency will operate in accordance with the RFA's framework and requirements during the Agency's issuance of CWA general permits (in other words, the Agency commits that it will apply the RFA in its issuance of general permits as if those permits do qualify as "rules" that are subject to the RFA). In satisfaction of this commitment, during the course of this general offshore oil and gas exploration, development and production operations permit proceeding, the Agency conducted the analysis and made the appropriate determinations that are called for by the RFA. In addition, and in satisfaction of the Agency's commitment, EPA will apply the RFA's framework and requirements in any future issuance of other NPDES general permits. EPA anticipates that for most general permits the Agency will be able to conclude that there is not a significant economic impact on a substantial number of small entities. In such cases, the requirements of the RFA framework are fulfilled by including a statement to this effect in the permit fact sheet, along with a statement providing the factual basis for the conclusion. A quantitative analysis of impacts would only be required for permits that may affect a substantial number of small entities, consistent with EPA guidance regarding RFA certification[4].

[4]EPA's current guidance, entitled Final Guidance for EPA Rulewriters: Regulatory Flexibility Act as Amended by the Small Business Regulatory Enforcement and Fairness Act, was issued in November 2006 and is available on EPA's web site: http://www.epa.gov/sbrefa/documents/rfafinalguidance06.pdf. After considering the Guidance and the purpose of CWA general permits, EPA concludes that general permits affecting less than 100 small entities do not have a significant economic impact on a substantial number of small entities.

I. **Analysis of Economic Impacts of the General Permit for Offshore Oil and Gas Exploration, Development and Production Operations off Southern California.** EPA determined that, in consideration of the discussion in Section H above, the issuance of General Permit for Offshore Oil and Gas Exploration, Development and Production Operations off Southern California would not have a significant economic impact on a substantial number of small entities. There are only 22 offshore platforms which could be affected by the proposed general permit modification. EPA concludes that since this general permit affects less than 100 small entities, EPA believes that it does not have a significant economic impact on a substantial number of small entities. Accordingly, EPA concludes that a quantitative analysis of impacts is not required for this permit.